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No. 87-1355

IN THE

SUPREME COURT OF THE UNITED STATES

October 1987 Term

DELORES HAYES - - - - - **Petitioner**

versus

CARMOL D. COOK, Judge, Edmonson Circuit Court, Edmonson County, Kentucky, and THE COMMONWEALTH OF KENTUCKY - Respondents

---

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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February 10, 1988

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Comes now the petitioner, by counsel, and, pursuant to the Rules of the Supreme Court of the United States, Part V, Rule 17 et seq., petitions the Court to review, on writ of certiorari, the decision of the Supreme Court of Kentucky rendered December 17, 1987, by Memorandum Opinion of the Court in case No. 87-SC-724-MR, Delores Hayes, Appellant, v. Carmol D. Cook, Judge, Edmonson Circuit Court, and the Commonwealth of Kentucky, Appellees. Petitioner states, pursuant to Rule 21:

QUESTIONS FOR REVIEW

At issue is whether a criminally accused has a right, pursuant to the 4th and 14th Amendments to the Constitution of the United States, to a fair and impartial hearing by a state grand jury. More specifically, the question is whether she has a right, pursuant to the 4th and 14th Amendments, not to be deprived of liberty by indictment, prior to trial, without due process of law.

Petitioner, indicted for manslaughter by the grand jury of Edmonson County, Kentucky, maintains that her indictment was the result of (1) erroneous, incomplete and misleading instructions of law submitted to the grand jury, and (2) misleading, prejudicially selective and prejudicially phrased testimony to the grand jury by the principal investigating peace officer displaying actual, personal and undue bias against her by the officer and the Commonwealth.

Petitioner maintains also that the law of Kentucky regarding grand jury proceedings and indictments is devoid of standards of due process of law.

PARTIES TO THE PROCEEDING

The caption hereinabove contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

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DELORES HAYES, - - - - - *Petitioner,*

v.

CARMOL D. COOK, Judge, Edmonson Circuit Court, Edmonson County, Kentucky, and THE COMMONWEALTH OF KENTUCKY, - *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

REFERENCES TO REPORTS OF OPINIONS

No published reports have been made of the case sought to be reviewed.

The decision of the Supreme Court of Kentucky was rendered December 17, 1987, in a Memorandum Opinion of the Court "NOT TO BE PUBLISHED" in case No. 87-SC-724-MR, Delores Hayes, Appellant, v. Carmol D. Cook, Judge, Edmonson Circuit Court, and the Commonwealth of Kentucky (Real Party in Interest), Appellees, on appeal from original action No. 87-CA-001297 in the Kentucky Court of Appeals.

The antecedent appealed decision of the Kentucky Court of Appeals was rendered August 3, 1987, in an unpublished Order in Original Action Regarding Edmonson Circuit Court, No. 87-CA-1927-OA, Delores

Hayes, Petitioner, v. Carmol D. Cook, Judge, Edmonson Circuit Court, Respondent.

The aforesaid original action in the Kentucky Court of Appeals was commenced after entry of an Order in the Edmonson (County, Kentucky) Circuit Court, Brownsville, Kentucky, dated and entered June 12, 1987, in case No. 87-CR-001, Commonwealth of Kentucky, Plaintiff, v. Delores Hayes, Defendant, denying petitioner's Motion to Quash or Dismiss the indictment against her.

All the aforesaid decisions, opinions, orders and judgments are reproduced in the Appendix hereto, as Exhibits 1, 2 and 3, respectively.

GROUNDS FOR JURISDICTION OF THIS COURT

The decree sought to be reviewed was rendered December 17, 1987, by the Supreme Court of Kentucky in Delores Hayes, Appellant, v. Carmol D. Cook, Judge, Edmonson Circuit Court, and the Commonwealth of Kentucky, Appellees, in a Memorandum Opinion of the Court in case No. 87-SC-724-MR, Original Action in (Kentucky) Court of Appeals No. 87-CA-001297.

There have been no motions for rehearing or extension of time within which to petition for certiorari.

No cross-petitions for writ of certiorari have been filed.

This Court has jurisdiction to review the decree in question by writ of certiorari pursuant to Article III, Sections 1 and 2, Article VI of the Constitution

of the United States; 28 USC 2101, and Rule 17 of the Rules of the Supreme Court of the United States. More specifically:

— The court of last resort of the state of Hawaii has decided the federal question presented herein in conflict with the decree of the court of last resort of the Commonwealth of Kentucky sought herein to be reviewed on writ of certiorari. *State* v. *Joao,* 53 Ha. 226, 491 P. 2d 1089 (1971). Rule 17.1(b).

— The court of last resort of the Commonwealth of Kentucky, in the decree sought herein to be reviewed on writ of certiorari, has decided an important question of federal law — whether a person can be deprived of liberty by indictment without due process of law — which has not been, but should be, settled by this Court. Rule 17.1(c).[1]

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the following constitutional provisions, statutes and regulations:

Constitution of the United States, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against un-

[1]At least two prior decisions of this Court—*Costello* v. *United States,* 350 U. S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (1956), and *Beck* v. *Washington,* 369 U. S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962)—are relevant but were decided on narrower issues than those presented herein and are not controlling.

reasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment XIV, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Kentucky Constitution, Section 1, Inherent and inalienable rights, subsections First, Third and Fifth:

> All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:
>
> First: The right of enjoying and defending their lives and liberties.
>
> * * * * * * *
>
> Third: The right of seeking and pursuing their safety and happiness.
>
> * * * * * * *
>
> Fifth: The right of acquiring and protecting property.
>
> * * * * * * *

Kentucky Constitution, Section 2, Absolute power does not exist in a republic:

> Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

Kentucky Constitution, Section 10, Security from search and seizure; conditions of issuance of warrant:

> The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

Kentucky Constitution, Section 11, Rights of accused in criminal cases; change of venue:

> In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. He can not be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land; and in prosecutions by indictment or information, he shall have a speedy public trial by an impartial jury of the vicinage; but the general assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained.

Kentucky Constitution, Section 26, Bill of Rights to remain inviolate:

> To guard against transgression of the high powers which we have delegated, we declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void. [Note: The first 26 sections of the Kentucky Constitution are subtitled the Bill of Rights.]

Kentucky Revised Statutes, Chapter 500, Section 070 (KRS 500.070), Burden of proof; defenses [enacted 1974, effective January 1, 1975]:

> (1) The Commonwealth has the burden of proving every element of the case beyond a reasonable doubt, except as provided in subsection (3). This provision, however, does not require disproof of any element that is entitled a "defense," as that term is used in this code, unless the evidence tending to support the defense is of such probative force that in the absence of countervailing evidence the defendant would be entitled to a directed verdict of acquittal.
>
> (2) No court can require notice of a defense prior to trial time.
>
> (3) The defendant has the burden of proving an element of a case only if the statute which contains that element provides that the defendant may prove such element in exculpation of his conduct.

Official Commentary by Kentucky Crime Commission and Legislative Research Commission to Kentucky

Revised Statutes, Chapter 500, Section 070 (KRS 500.070, Burden of proof; defenses) [1974]:

> This provision is a special definition section to apply generally throughout the Code. It assumes that in defining the specific offenses, and some of the general provisions, there will be a need for two different types of "defenses." The first, which will be designated simply as "defense," will serve to impose upon a defendant only the responsibility of raising a certain issue. Once such an issue is raised the state must establish its negative beyond a reasonable doubt. This concept is used to eliminate the necessity of the state disproving elements that are not really involved in the case. An example of a defense that would be treated under this first subsection is duress, as defined in KRS 501.090.
>
> The second type of defense that will be given general use in the Code is described in subsection (3). In addition to requiring that the defendant raise a defense that is so designated, this subsection requires that he establish it to the satisfaction of the jury. With this procedural device, it is possible to cast upon a defendant a reasonable burden of proof in situations where it would be inequitable to require the state to disprove a fact beyond a reasonable doubt. An example of such a defense is insanity, as defined in KRS 504.020.
>
> This section does not change prior law. Previously there were elements of a case upon which a defendant had merely the burden of going forward with evidence, i.e., a duty to introduce such elements as issues in the case. Subsection (1) does not attempt to deal with the matter of when that

duty is satisfied. Similarly, there were elements of a case upon which a defendant had the burden of proof, i.e., a duty to persuade the jury that the elements exist. Subsection (3) does not affect the manner in which juries are instructed as to such elements. This is a matter peculiarly for the courts to resolve, as has been the case under pre-existing law.

Kentucky Revised Statutes, Chapter 500, Section 100 (KRS 500.100), Effect of commentary [enacted 1974, effective January 1, 1975]:

> The commentary accompanying this code may be used as an aid in construing the provisions of this code.

Kentucky Revised Statutes, Chapter 503, Section 020 (KRS 503.020), Justification; a defense [enacted 1974, effective January 1, 1975]:

> In any prosecution for an offense, justification, as defined in this chapter, is a defense.

Official Commentary by Kentucky Crime Commission and Legislative Research Commission to Kentucky Revised Statutes, Chapter 503, Section 020 (KRS 503.020, Justification, a defense) [1974]:

> By designating justification as a defense, this section serves to impose upon defendants the burden of raising the issues covered in this chapter. Once this responsibility is satisfied as to a particular issue (see KRS 500.070), the prosecution must bear the ultimate burden of persuading the jury that the defendant was not justified.

Kentucky Revised Statutes, Chapter 503, Section 050 (KRS 503.050), Use of physical force in self-protection [enacted 1974, effective January 1, 1975]:

> (1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.
>
> (2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, or sexual intercourse compelled by force or threat.

Kentucky Revised Statutes, Chapter 503, Section 060 (KRS 503.060), Improper use of physical force in self-protection [enacted 1974, effective January 1, 1975]:

> Notwithstanding the provisions of KRS 503.050, the use of physical force by a defendant upon another person is not justifiable when:
>
> (1) The defendant is resisting an arrest by a peace officer, recognized to be acting under color of official authority and using no more force than reasonably necessary to effect the arrest, although the arrest is unlawful; or
>
> (2) The defendant, with the intention of causing death or serious physical injury to the other person, provokes the use of physical force by such other person; or
>
> (3) The defendant was the initial aggressor, except that his use of physical force upon the other person under this circumstance is justifiable when:

(a) His initial physical force was nondeadly and the force returned by the other is such that he believes himself to be in imminent danger of death or serious physical injury; or

(b) He withdraws from the encounter and effectively communicates to the other person his intent to do so and the latter nevertheless continues or threatens the use of unlawful physical force.

Kentucky Revised Statutes, Chapter 503, Section 070 (KRS 503.070), Protection of another [enacted 1974, effective January 1, 1975]:

(1) The use of physical force by a defendant upon another person is justifiable when:

(a) The defendant believes that such force is necessary to protect a third person against the use or imminent use of unlawful physical force by the other person, and

(b) Under the circumstances as the defendant believes them to be, the person whom he seeks to protect would himself have been justified under KRS 503.050 and 503.060 in using such protection.

(2) The use of deadly physical force by a defendant upon another person is justifiable when:

(a) The defendant believes that such force is necessary to protect a third person against imminent death, serious physical injury, kidnapping or sexual intercourse compelled by force or threat;

(b) Under the circumstances as they actually exist, the person whom he seeks to protect

would himself have been justified under KRS 503.050 and 503.060 in using such protection.

Kentucky Revised Statutes, Chapter 503, Section 080 (KRS 503.080), Protection of property [enacted 1974, effective January 1, 1975]:

(1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is immediately necessary to prevent:

(a) The commission of criminal trespass or burglary in a dwelling, building or upon real property in his possession or in the possession of another person for whose protection he acts; or

(b) Theft, criminal mischief, or any trespassory taking of tangible, movable property in his possession or in the possession of another person for whose protection he acts.

(2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that the person against whom such force is used is:

(a) Attempting to dispossess him of his dwelling otherwise than under a claim of right to its possession; or

(b) Committing or attempting to commit a burglary of such dwelling; or

(c) Committing or attempting to commit arson of a dwelling or other building in his possession.

Kentucky Revised Statutes, Chapter 503, Section 100 (KRS 503.100), Prevention of suicide or a crime [enacted 1974, effective January 1, 1975]:

> (1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is immediately necessary to prevent such other person from:
>
> (a) Committing suicide or inflicting serious physical injury upon himself; or
>
> (b) Committing a crime involving or threatening serious physical injury to person, substantial damage to or loss of property, or any other violent conduct.
>
> (2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1)(b) only when the defendant believes that the person whom he seeks to prevent from committing a crime is likely to endanger human life.
>
> (3) The limitations imposed on the justifiable use of force in self-protection by KRS 503.050 and 503.060, for the protection of others by KRS 503.-070, for the protection of property by KRS 503.080, and for the effectuation of an arrest or the prevention of an escape by KRS 503.090 apply notwithstanding the criminality of the conduct against which such force is used.

Kentucky Revised Statutes, Chapter 507, Section 040 (KRS 507.040), Manslaughter in the second degree [enacted 1974, as amended effective July 13, 1984]:

> (1) A person is guilty of manslaughter in the second degree when, including, but not limited to,

the operation of a motor vehicle, he wantonly causes the death of another person.

(2) Manslaughter in the second degree is a Class C felony.

Kentucky Rules of Criminal Procedure, Rule (RCr) 5.10, Evidence Supporting Indictment [adopted effective January 1, 1963, by Kentucky Court of Appeals, then Kentucky's court of last resort, as amended effective September 1, 1981, by Supreme Court of Kentucky]:

> The grand jurors shall find an indictment where they have received what they believe to be sufficient evidence to support it, but no indictment shall be quashed or judgment of conviction reversed on the ground that there was not sufficient evidence before the grand jury to support the indictment.

STATEMENT OF THE CASE

Petitioner, Delores Hayes (hereinafter Delores), on March 7, 1987, shot and killed Mark Lindsey (hereinafter Mark) as he was breaking into her home. Present with Delores in her home at the time were her 3-year-old son, Christopher Hayes; her 13-year-old cousin, Donna Jean (D.J.) Carroll, and her aged and infirm grandparents, Cecil Torrence, age 69, and Bertha Torrence, age 76, a chair-bound invalid.

Mark had lived with Delores in the prior year and was seeking to renew her affections. He had been arrested numerous times in the prior year for incidents of assaults and threats against Delores, threats against

her grandfather and assault and abduction of her son, then 2 years old.

Late March 7 or in the early hours of March 8, 1987, Delores was arrested by Kentucky State Police Detective Roger Castle and charged with murder. She was discharged after preliminary hearing by the Edmonson (County, Kentucky) District Court but subsequently indicted by the Edmonson County Grand Jury on a charge of second-degree manslaughter (Indictment No. 87-CR-001, Edmonson Circuit Court, Commonwealth of Kentucky v. Delores Hayes; see Exhibit 4, Appendix hereto).

Delores relied on the defense of justification, as shown at her preliminary hearing in Edmonson District Court in action No. 87-F-004, Commonwealth of Kentucky v. Delores Jean Hayes, and as shown by the evidence presented to the grand jury leading to the indictment. (In the District Court action, Delores was discharged by the Hon. Robert E. Hawley, Judge, on his finding, at the preliminary hearing, that her shooting Mark was a clear case of justifiable homicide. The principal witness at the grand jury investigation, Detective Castle, was the same principal witness at the preliminary hearing.[2])

A transcript of the grand jury testimony was submitted to the Kentucky Court of Appeals as Exhibit M

[2]Petitioner and her attorney are aware that a ruling at a preliminary hearing is not binding on either a grand jury or a trial court. The evidence and ruling at the preliminary hearing are cited herein, however, to demonstrate the Commonwealth's awareness of Delores' justification defense as the time of the presentation of the case to the grand jury.

to petitioner's Petition for Relief Pursuant to CR 76.36 filed therewith, and will be found in the Record in separate binding, with red cover. A transcript of the preliminary hearing was submitted therewith as Exhibit N, and will be found in the Record in separate binding, with blue cover.

The transcript of the grand jury hearing shows, at pages 15 and 16, that the grand jury inquired about the law of justification; that the attorney for the Commonwealth declined to advise the grand jurors thereof, and that the principal witness, Detective Castle, gave them incomplete, incorrect and misleading advice thereon, as follows (beginning at page 15, line 25):

> Juror: At what point is it justified to use force?
>
> Castle: I can't answer that.
>
> Dortch [Commonwealth's Attorney]: I don't want to answer that one.
>
> Castle: I can't answer that. I think, really, you've gotta be in fear of your life, really.
>
> Dortch: Yes, there are Statutes set out.
>
> Castle: There are Statutes, that's one of the things, you've gotta be in fear of your life. The lady in this case, I don't believe she was in fear of her life or really bad of being injured, because she had talked to him within an hour or within two hours, anyway. . . .

The grand jury had heard evidence that Mark:

—Had thrown a log through the window of Delores' residence, breaking the glass. Page 2, line 13; page 3, lines 11-12; page 26, lines 1-4.

—Had broken the window glass of Delores' automobile. Page 26, line 6.

—Had thrown glass at Delores with Delores' aged and infirm grandfather, her 13-year-old cousin and her 3-year-old son in proximity. Page 3, lines 15, ~~24; p~~age 9, lines 9-14, 16-17; page 23, lines 4-9.

—Was entering Delores' home through the broken window, while throwing the glass, when she shot him. Page 3, line 14; page 9, lines 1-5.

Despite this evidence, the officer and the attorney for the Commonwealth failed to advise the grand jury:

—That the use of deadly force is justifiable not only to protect oneself against death, but also against serious physical injury, kidnapping and sexual intercourse compelled by force or threat (and, with regard to the last of those three, the grand jury heard evidence that Delores and Mark had been lovers, and that Delores at the time was resisting Mark's amorous advances). Kentucky Revised Statutes (KRS) 503.050(2).

—That use of deadly force is justifiable also to protect third persons (such as Delores' aged and infirm grandparents, her 13-year-old cousin and her 3-year-old son, whom Mark had been convicted of abducting and brutally beating) against imminent death, serious physical injury and kidnapping. KRS 503.070(2).

—That use of deadly force is justifiable also to prevent a burglary of one's dwelling or other unlawful dispossession thereof. KRS 503.080 (2).

—That use of deadly force is justifiable also to prevent a crime likely to endanger human life. KRS 503.100.

The transcript does not show, but the tape recording of the grand jury proceedings does, that the grand juror's question regarding the use of force was greeted by laughter from the witness, the attorney for the Commonwealth and at least one other person. There are other, unintelligible remarks by the grand juror or the attorney for the Commonwealth at that point, including some that appear to include the word "philosophy." An excerpt of the recording, containing this exchange, was submitted to the Kentucky Court of Appeals as Exhibit O, in the form of a cassette tape, and will be found in the Record.

Detective Castle stated 23 times in his 30-page testimony that Delores "invited" Mark to her house. Page 3, lines 1-2, 9-10; page 5, lines 17-18; page 7, line 6; page 8, lines 2, 3, 3 (repeated); page 10, line 11; page 11, lines 9-10, 10, 10-11; page 15, lines 8, 12-13; page 16, lines 9, 10-11, 11, 11-12, 13-14; page 21, lines 21-22; page 25, lines 21-22, 22, 22-23; page 27, lines 10-11, Exhibit M, Record. Most of these references are made as if the "invitation" were unquestioned fact.

In fact, however, the officer's only source of this assertion is a statement he received from Dale Decker, whom he described as a "good friend" of Mark (page 15, line 24), and who shared at least 20 beers with Mark the date of the incident (page 11, lines 1-2; page 19, lines 5-6; page 27, line 17, through page 28, line 1;

page 28, lines 11-18. The officer attributed the "invitation" evidence also to Delores' 13-year-old cousin, Donna Jean [D. J.] Carroll; but that obviously is a mistake, or deliberate deception, as no such evidence is apparent in the two written statements he took from the Carroll girl, copies of which were provided by the Commonwealth in discovery and submitted to the Kentucky Court of Appeals as Exhibit D, and will be found in the Record).

Similarly the officer reiterated, seven times in his testimony, his failure to find any blood on the couch under the window through which Mark was shot. Page 3, line 22; page 5, line 6; page 6, lines 9-10, 19; page 8, lines 20-21; page 12, lines 20-22; page 18, lines 16-17, Exhibit M (grand jury transcript), Record. He failed to mention, however, evidence of blood found on the isinglass curtains that fell over the couch when the window broke.

The officer seems to have taken as fact also Dale Decker's assertion that Mark was not drunk, despite admission by Decker that he and Mark had shared at least 20 beers the day of the shooting. Page 11, lines 1-2; page 19, lines 7-11; page 27, line 15; page 27, line 24, through page 28, line 2; page 28, lines 11-18. See, in particular, Officer Castle's testimony at page 28, lines 1-4:

> CASTLE: And, in his opinion, Mark Lindsey was not drunk. He said he was drinking, but he wasn't high. Said he wasn't drunk. *So, they can't say that he was drunk and went up there on*

a drunken rage you know, and trying to break in. [Emphasis added.]

The autopsy showed that Mark's blood contained .13 per cent of ethyl alcohol by weight. A copy of the last page of the autopsy report, showing the ethanol intoxication, provided by the Commonwealth in discovery, was presented to the Court of Appeals as Exhibit G, and will be found in the Record.

Delores moved the Circuit Court for dismissal, or remand to the grand jury, of the indictment. Her motion was denied. See Exhibit C to the petition filed with the Court of Appeals, in the Record. The question of violation of the due process clause of the 14th Amendment to the Constitution of the United States, sought to be reviewed herein, was first raised in this motion, at pages 3, 10 and 11 thereof. The pertinent excerpts of the motion are reproduced herein as Exhibit 5 in the Apendix hereto.

Delores then filed her Petition for Relief pursuant to CR 76.36 in the Kentucky Court of Appeals for a writ to prohibit the Circuit Court Judge (respondent herein) from holding trial on the indictment and/or to mandate him to remand the indictment to the Edmonson County grand jury. The due process clause was cited therein also, at pages 1 and 13 thereof. The pertinent excerpts of the petition are reproduced herein as Exhibit 6 in the Appendix hereto. Her petition was denied by the Court of Appeals in a one-page Order dated August 3, 1987 (see Exhibit 2, Appendix hereto).

Delores appealed the decision of the Kentucky Court of Appeals to the Supreme Court of Kentucky, again citing the 14th Amendment, at pages 1 and 2, inter al, of her Brief for Appellant, pertinent excerpts of which are reproduced herein as Exhibit 7 in the Appendix hereto. The Supreme Court of Kentucky affirmed the ruling of the Kentucky Court of Appeals in a Memorandum Opinion dated December 17, 1987 (see Exhibit 1, Appendix hereto). It is that decree that petitioner seeks review of herein by writ of certiorari.

May it please the Court:

ARGUMENT

The grand jury that returned the indictment against petitioner was misinformed as to the law of justification as set out in Kentucky Revised Statutes (KRS) Chapter 503, and her indictment deprived her of her liberty without due process of law in violation of sections 1, 2, 10, 11 and 26 of the Kentucky Constitution and the 14th Amendment to the Constitution of the United States.

With the evidence presented to the grand jury, the Commonwealth had a duty to advise the grand jury of the law of justification, and to advise it correctly. The Commonwealth has the burden of proof as to all elements of the crime of which the defendant is accused. Kentucky Revised Statutes (KRS) 500.070 and official commentary thereto; Kentucky Constitution, §11; Constitution of the United States, 14th Amendment.

Once the issue of justification is raised, the Commonwealth bears the burden of its disproof, according to the statute and the official commentary thereto by the 1974 Kentucky Crime Commission and Legislative Research Commission. See also the official commentary to KRS 503.020.

Disproof of justification in a case in which that defense is raised, therefore, and likewise, becomes one of the necessary elements of reasonable grounds to believe a felony has been committed, a traditional standard for indictment.

See KRS 500.070(1), ascribing the burden of proof, beyond a reasonable doubt, to the Commonwealth if the evidence of justification "is of such probative force that in the absence of countervailing evidence the defendant would be entitled to a directed verdict of acquittal."

A traditional standard for no bill by a grand jury —no reasonable grounds to believe a felony has been committed—is roughly equivalent to the standard for a directed verdict in a criminal trial: If the prosecution fails at trial to show reasonable grounds to believe a felony has been committed, the defendant is entitled to a directed verdict. (The standard is roughly equivalent also to that of probable cause, which the District Court ruled, at Delores' preliminary hearing, necessitated disproof of justification in this case.)

The Commonwealth has argued, before the Supreme Court of Kentucky and inferior Kentucky courts (and it finds support for this argument in the treatises and

case law of Kentucky), that the only standard for indictment is Kentucky Rules of Criminal Procedure (RCr) 5.10, which provides, "The grand jurors shall find an indictment where they have received what they believe to be sufficient evidence to support it. . . ."

This is no standard at all, at law, for it requires no legal basis, nor instruction or advice in law, nor even probable cause.

If this is the only standard, it gives a grand jury arbitrary power over persons' liberties, in gross violation of Section 2 of the Kentucky Constitution, which provides, "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

If this is the only standard, any arrest warrant that issues on the basis of an indictment (like the warrant on which the petitioner in this case was arrested) from a grand jury with such power is void, according to Section 10 of the Kentucky Constitution, which provides that "no warrant shall issue to . . . seize any person . . . without probable cause. . . ."

If this is the only standard, no warrant for arrest issuing on an indictment is valid because, according to Section 11 of the Kentucky Constitution, no one can "be deprived of his . . . liberty . . . unless by . . . the law of the land."

Nor can the Commonwealth, in good faith, argue that RCr 5.10 is the law of the land, since Section 26 of the Kentucky Constitution provides "that everything in this Bill of Rights," including Sections 2, 10

and 11 of the Kentucky Constitution, "is excepted out of the general powers of government, and shall forever remain inviolate; and all laws thereto, or contrary to this Constitution, shall be void."

All of this invokes the due process clause of the 14th Amendment to the Constitution of the United States, for to be deprived of liberty even in violation of a statute or rule or regulation, to say nothing of a state constitution, is to be deprived without due process of law.

That being under indictment amounts to a deprivation of liberty is axiomatic. An indictment causes an arrest (and caused petitioner's arrest in the case; she is yet under bond). See Black's Law Dictionary, 5th Ed. (West, 1979), at "Liberty"; *Monroe* v. *Pape,* 365 U. S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961); *Buchanan* v. *Sowa,* 592 F. Sup. 1009 (N.D. Ohio, E.D., 1984), at 1014-1015.

Even heavier than its duty to advise the grand jury correctly is the Commonwealth's duty *not* to advise the grand jury *incorrectly,* or incompletely. *No* advice, in the case at bar, would have been more proper than that given.

KRS Chapter 503 is, largely, a codification of the common law of justification, which is generally well known, albeit vaguely, to the lay public, usually by the terms "self-defense" and "justifiable homicide." See *Davis* v. *Commonwealth,* Ky., 252 S.W. 2d 9 (1952), and other cases cited in Chapter 503 of annotated editions of Kentucky Revised Statutes, and the official

commentary thereto. But for the incorrect and incomplete advice given, the grand jury might well have known on its own that this was a case of justifiable homicide.

The significance of Officer Castle's advice to the jury that the use of deadly force is justified only when "you've gotta be in fear of your life, really," is enhanced by his repetition of his opinion that Delores was not afraid of Mark for herself (page 7, lines 5-6; page 9, lines 6-8; page 16, lines 7-9; page 21, lines 1-3; page 24, line 22, through page 25, line 5, of the grand jury transcript, Exhibit M in the Record, in separate binding, with blue cover), while conceding in only one instance that Delores feared for her grandfather and her 13-year-old cousin (page 9, lines 7-8), without suggesting that Delores might have feared also for her 3-year-old son, and without even mentioning the presence of Delores' 76-year-old invalid grandmother, who, sitting helpless in a chair between Mark and Delores, was nearly struck by the glass thrown by Mark (as was shown by witnesses for the Commonwealth at the preliminary hearing).

An indictment returned under improper or incomplete legal advice is quashable if it would not have been returned under full and proper advice—particularly advice regarding applicable statutes. *People* v. *Kinnicut,* 371 N.Y.S. 2d 984, 83 Misc. 2d 229 (1975). See also *United States* v. *Daneals,* 370 F. Sup. 1289 (W.D. N.Y., 1974), at 1293, in which the answer to a grand juror's question regarding the basis of a conscientious

objection claim was held to have improperly led the grand jury to focus on religion; the indictment was dismissed.

Delores' indictment was returned not only with misconception of the law, but also on misleading, prejudicially selective and prejudicially phrased testimony by the principal investigating peace officer, displaying actual, personal and undue bias against Delores. This is another violation of the same sections, and of due process.

An indictment is quashable also for bias in the presentation of evidence by the prosecution. *State* v. *Joao,* 53 Ha. 226, 491 P. 2d 1089 (1971); *United States* v. *Daneals, supra.* The *Joao* decision, by the court of last resort of the state of Hawaii, is directly in conflict with the decision of the Supreme Court of Kentucky in the case at bar, precisely on the issue of violation of the due process clause of the 14th Amendment in the return of an indictment.

No evidence was presented to the grand jury in the case at bar that Delores' 76-year-old, invalid grandmother was sitting in a chair, immoble, between Delores and Mark, when Mark threw the glass as Delores; that the glass shattered against a wall above Delores' head, and that a piece of the shattered glass landed at the foot of the grandmother's chair.

This evidence was before the District Court at the preliminary hearing; and, in fact, it was another state police officer—Mike Vincent—who testified at the preliminary hearing that he found the piece of glass near

the grandmother's chair. Exhibit N, Record (transcript of Edmonson District Court proceedings, in separate binding, with blue cover), page 64, line 260; page 68, line 278, to 69, line 282. Trooper Vincent was not even called before the grand jury; and Officer Castle, who heard Vincent's testimony at the preliminary hearing, did not relate it to the grand jury. He did not even tell the grand jury that Delores had a grandmother, let alone that her grandmother was in the house, was a helpless invalid and was the closest human being to Mark's assault.

The investigating officer's bias against Delores is apparent, throughout his testimony, not only in his choice of evidence to present and withhold (such as that of Delores' invalid grandmother's sitting in the path of the glass thrown by Mark), but also in his repetition of certain evidence and in his characterization of the evidence he chose to relate.

Officer Castle's conclusion that Mark was not drunk, or "high," needs to be compared not only with his own, and Dale Decker's, grand jury testimony about the large quantity of beer Decker and Mark had consumed the day of the shooting, but also with the autopsy finding that Mark's blood contained .13 per cent of ethyl alcohol by weight.

In contrast to the officer's characterizing as fact Decker's statements that Delores invited Mark to her home and that Mark was sober, there is virtually no reference in the officer's testimony regarding statements made by Delores and her 13-year-old cousin that

is not qualified by the adverb "supposedly" or other expression of doubt. See, e.g.:

> CASTLE: Well, she said, you know, she said that he broke the window out with a log. I don't know that, I'm assuming that she's telling the truth about that. There was a big log in the house. This is is [sic] a plexiglas window that he threw it. And she says that he left from the porch, going out towards the car, she said, just walked off the porch, she didn't know where he went to. Said when he came back, she said he told us, now I've broke the window out of your car and he sat down in the chair there in front of the window and was talking to them or hollering at them through the window, but he, you know, here is some guy, you know, that supposedly does all this and comes back and sits down and talks to you through the window. [Page 26, lines 1-10, Exhibit M, Record.]
>
> CASTLE: There was, but at the time I interviewed both Delores and D. J. on the night of the shooting, they did not know that, you know, that he had went out and broke out the window. Supposedly he came back and told them, he said, I broke your window out of your car. So I don't know that, that's what she said, said I broke your window in your car. [Page 25, lines 11-15.]
>
> JUROR: Did she tell him to leave?
>
> CASTLE: She said, yea, that I told him to leave. But, you know, I wasn't there, I don't know whether she did or not. But that was, you know, the statement given. [Page 21, lines 8-11.]

In other passages, the officer appears to be arguing, not testifying, to the grand jury. E.g.:

> CASTLE: But, do you go to somebody's house that you know and have been invited to and try to break in? [Page 21, lines 21-22.]
>
> CASTLE: Everybody that I talked to, including the little girl, you know, I mean, she, I believe, told everything that they know about it. You know, there's not doubt, you know, in the past, you know, there's records indicating that they have fought and had troubles, but after each fight, and after every squabble, that they've had, she was always coming back and getting him. He had no car. She'd be waiting for him when he'd get out of jail. She would come and get him from Leitchfield. She would accept phone calls from him collect. Does this sound like somebody who's scared of him? It don't to me, you know, that she was in fear, you know, or afraid of him. It don't indicate to me that. [Page 24, line 22, through page 25, line 5.]

The officer's testimony is replete with these and other argumentative passages—see, for example, his argumentative reconstructions of the shooting, of Mark's position when he was shot, of the path of the bullet, of the force of the revolver and of the pattern of Mark's bleeding, at page 3, lines 17-22; page 5, lines 2-7; page 6, lines 10-19; uage 8, lines 13-21; page 12, lines 16-20; page 13, lines 1-4, 7-12, lines 17-23; page 14, lines 8-13; page 17, lines 16-23; page 18, lines 11-17; page 20, lines 15-23.

A telling point of the prejudice shown by the officer is the following comparison: At page 7, lines 6-8, he states that Mark was "outside the window . . . not

climbing through the window" according to *"all the evidence that I've got"* (emphasis added). But note the following evidence he had—excerpts of statements taken, written and witnessed by the officer himself (the statements were provided by the Commonwealth in discovery; copies of the complete statements were submitted to the Kentucky Court of Appeals as exhibits, as indicated below):

> —Mark broke the window out and started in through the window and Lois [Delores' family nickname] shot Mark. [Statement of Cecil Torrence, 3/7/87; Exhibit E, Record.]
>
> —. . . [H]e returned to the window and was leaning inside. [Statement of Donna Jean (D. J.) Carroll, 3/7/87, page 2, lines 4-5; Exhibit D, Record.]
>
> —Mark was coming through the window. . . . [Statement of Delores Hayes, 3/7/87, page 2, lines 19-20; Exhibit F, Record.]

The three persons whose statements are quoted—Donna Jean Carroll, Cecil Torrence and Delores Hayes—are the only competent living eyewitnesses to the shooting (the only others present, still living, were Christopher Hayes, age 3, and Bertha Torrence, a 76-year-old invalid).

The officer argued vigorously that the path of the bullet through Mark's body—entering the front of the neck and lodging lower, in the back—is indicative that Mark was sitting in the chair on the porch when shot. But that evidence is just as consistent with the eye-

witnesses' testimony that he was leaning forward, coming through the window, when shot.

Absent from Officer Castle's presentation to the grand jury and not found anywhere else in the grand jury transcript is the evidence presented to the District Court that Mark had been arrested at least eight times in the year preceding his death for assaults and threats on Delores, for abducting Delores' then 2-year-old son and for a brutal assault on Delores' then 2-year-old son with a belt buckle; that he received suspended sentences, continuances or deferred prosecutions for all those offenses except the assault on Delores' son, and that there were outstanding, at the time he was shot, warrants for his arrest for failure to comply with court orders in some of those cases and a new warrant for his arrest for escaping from the Edmonson County Sheriff just eight days before at Delores' home. Exhibit N, Record (transcript of Edmonson District Court proceedings, in separate binding, with blue cover), pages 62 (testimony of Edmonson County Deputy Sheriff Jim Fitts), 76-78 (testimony of Edmonson County Sheriff Jerry Prunty), and 94-95 (judicial notice of Edmonson District Court records). See also Exhibit B, Record, Delores' Motion for Recusal (reproduced as Exhibit 8 in the Appendix hereto), filed in the Edmonson Circuit Court action March 30, 1987, citing 10 Edmonson District Court, Edmonson Circuit Court and Grayson District Court actions against Mark and reciting the specific dispositions thereof.

A reading of Officer Castle's entire grand jury testimony (the first 30 pages of Exhibit M, Record) gives the flavor, the innuendo, the argumentative tone of his presentation. The evidence presented at the preliminary hearing before the Edmonson District Court (Exhibit N, Record), and particularly Officer Castle's testimony therein, is in stark contrast.

If the Court is curious as to motive for prejudice in this case, it is directed to the criticism of the state police officer by Delores' counsel in his argument at the preliminary hearing in the District Court (Exhibit N, Record, pages 104-112, and particularly 108-112), and to the District Court Judge's commentary and ruling thereon (Exhibit N, pages 118-121). These excerpts are reproduced in the Appendix hereto, as Exhibits 9 and 10.

See also Exhibit H submitted to the Kentucky Court of Appeals (Record), a reproduction of an article in the Edmonson News weekly newspaper, in which the District Court Judge is publicly quoted saying, "If this isn't justified self-defense, I don't know what is" (actually, the Court's remark, according to the transcript, at page 120, Exhibit N, Record, was, "If this does not constitute justifiable self-defense and protection of yourself and others, to whom you have responsibility, frankly, I don't know what would"). The article is reproduced in the Appendix hereto as Exhibit 11.

The Court is directed also, for motive of prejudice, to general public criticism of the state police handling

of the case, exemplified in a number of newspaper articles, true copies of which were submitted to the Kentucky Court of Appeals as Exhibits H, I, J, K and L, Record.[3]

No Kentucky cases were found, pro or con, directly in point on the two issues raised in petitioner's appeal —incorrect or incomplete legal advice to a grand jury and prejudicial presentation to a grand jury. *Vaughn* v. *Commonwealth,* Ky., 485 S.W. 2d 497 (1972), however, is authority for quashal or dismissal of an indictment for manifest irregularity in the grand jury proceedings.

But the cases from other jurisdictions cited hereinabove speak in terms of federal constitutional rights applicable to Kentucky.

The New York case cited, while not from a state court of last resort, is directly in point on the issue of improper legal advice, and particularly of advice regarding applicable statutes. *People* v. *Kinnicut, supra.*

The Hawaii case cites precedent from a number of other jurisdictions, including this Court, and holds that quashal of an indictment is an appropriate remedy

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[3]The undersigned counsel is aware that the publication dates of some of these articles are later than the date of Officer Castle's testimony to the grand jury; they are cited, however, as indicative of public sentiment existing at the time of his testimony, albeit published later. One of these—Exhibit H, Record, the aforesaid Edmonson News article—although dated March 19, 1987, actually was published on March 18, 1987, the date of Officer Castle's grand jury testimony. These articles are reproduced also in the Appendix hereto as Exhibits 11, 12, 13, 14 and 15.

"where a defendant's substantial constitutional right to a fair and impartial grand jury proceeding is prejudiced." *State v. Joao, supra,* at 491 P. 2d 1092.

The federal case holds that an indictment should be dismissed if the "totality of the circumstances" of grand jury proceedings "deprives defendants of their protection against false accusations." *United States* v. *Daneals, supra.*

The Kentucky courts held, in the case at bar, that petitioner was procedurally incorrect in seeking a writ of prohibition—that she had an adequate remedy by appeal. That simply is not the case. With the status of Kentucky law as aforesaid — the only recognized standard for indictment being "what they [the grand jurors] believe to be sufficient evidence to support it" (RCr 5.10)—there can be no appeal on the basis of procedural defect in the indictment process. There is not even a standard of discretion—in the rule, in the statutes or in the case law.

And even if petitioner should be acquitted at trial, or convicted with reversal on appeal, she has nonetheless been deprived of her liberty, by being placed under arrest and required to post bond, without due process of law, pending trial and appeal.

This petition is not a plea for dismissal of an indictment for insufficient evidence. Delores and her undersigned counsel are well aware that Kentucky courts have ruled that they will not second-guess a grand jury on the sufficiency of evidence for indictment. While that proposition is questionable, in light

of the discussion hereinabove of sections 2, 10, 11 and 26 of the Kentucky Constitution and the 14th Amendment to the Constitution of the United States, that is not the issue at bar. The issues are erroneous, incomplete and misleading legal instruction, and undue bias and selectivity in the presentation of the evidence.

The grand jury system is not merely for the bringing of formal criminal accusation; that can be done more efficiently by a prosecuting attorney. It is for weeding out cases not worthy of prosecution. *Hannah* v. *Larche,* 363 U. S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1969), at 498-499 (dissenting opinion by Douglas, J.).

And due process of law is not merely a defendant's right to a fair trial, but includes her right not to be unjustly accused, as *United States* v. *Daneals, supra,* held, and not to be deprived of liberty before trial without due process. That is what the grand jury system is all about. That is one reason the proceedings are secret. *Hannah* v. *Larche, supra,* at 363 U. S. 499 (dissenting opinion by Douglas, J.).

If the only standard for indictment is the sufficiency of the evidence as *determined by the grand jurors,* then there is no standard at law; and anyone indicted is thereby, perforce, deprived of liberty without due process of law.

This is true not only in this case, where the issues are improper and inadequate legal instruction and unduly prejudicial presentation, but also in cases raising the question of sufficiency of the evidence to indict. The grand jury, without standards at law, becomes the

sole arbiter of sufficiency of evidence to indict, without legal guidance; and there is no due process. Such unlimited discretion is in direct conflict with—

—Section 1 of the Kentucky Constitution, ensuring the people "the right of enjoying and defending their lives and liberties" (this section also guarantees to the people "the right of seeking and pursuing their safety" and "the right of . . . protecting property," both acutely applicable to the situation petitioner found herself in when her ex-lover burst into her home);

—Section 2 of the Kentucky Constitution, prohibiting "[a]bsolute and arbitrary power over the . . . liberty of freemen . . . in a republic . . .";

—Section 10 of the Kentucky Constitution, ensuring the people security "in their persons . . . from unreasonable . . . seizure . . . without probable cause . . .";

—Section 11 of the Kentucky Constitution, prohibiting deprivation of liberty "unless by the judgment of . . . the law of the land," and

—The 14th Amendment to the Constitution of the United States, prohibiting deprivation by "any State . . . of . . . liberty . . . without due process of law . . . ," and incorporating within the concept of due process the safeguards, of the 4th Amendment, ensuring "[t]he right of the people to be secure in their persons . . . against un-

reasonable . . . seizures'' and prohibiting issuance of arrest warrants (such as those issued on indictments) except ''upon probable cause.''

Respectfully submitted,

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February 10, 1988

APPENDIX

APPENDIX

EXHIBIT 1: Decision of the Supreme Court of Kentucky rendered December 17, 1987, in a Memorandum Opinion of the Court "NOT TO BE PUBLISHED" in case No. 87-SC-724-MR, Delores Hayes, Appellant, v. Carmol D. Cook, Judge, Edmonson Circuit Court, and the Commonwealth of Kentucky (Real Party in Interest), Appellees. Page 3a.

EXHIBIT 2: Order of the Kentucky Court of Appeals rendered August 3, 1987, in case No. 87-CA-1927-OA, Delores Hayes, Petitioner, v. Carmol D. Cook, Judge, Edmonson Circuit Court, Respondent, in Original Action Regarding Edmonson Circuit Court. Page 8a.

EXHIBIT 3: Order of the Edmonson (County, Kentucky) Circuit Court, Brownsville, Kentucky, dated and entered June 12, 1987, in case No. 87-CR-001, Commonwealth of Kentucky, Plaintiff, v. Delores Hayes, Defendant, denying petitioner's Motion to Quash or Dismiss the indictment against her [Exhibit C, Record]. Page 9a.

EXHIBIT 4: Indictment No. 87-CR-001, Edmonson Circuit Court [Exhibit A, Record]. Page 10a.

EXHIBIT 5: Excerpt of petitioner's Motion to Quash or Dismiss the indictment against her in Edmonson Circuit Court [Exhibit C, Record]. Page 11a.

EXHIBIT 6: Excerpt of petitioner's Petition for Relief Pursuant to CR 76.36 to the Kentucky Court of Appeals. Page 13a.

EXHIBIT 7: Excerpt of petitioner's Brief for Appellant to the Supreme Court of Kentucky. Page 15a.

EXHIBIT 8: Petitioner's Motion for Recusal filed in Edmonson Circuit Court [Exhibit B, Record]. Page 17a.

EXHIBIT 9: Excerpts of petitioner's attorney's argument to the Edmonson District Court at preliminary hearing [Exhibit N, Record, pages 108-112]. Page 22a.

EXHIBIT 10: Ruling of the Edmonson District Court, the Hon. Robert E. Hawley, Judge, at preliminary hearing [Exhibit N, Record, pages 118-121]. Page 25a.

EXHIBIT 11: Article in Edmonson News weekly newspaper, Brownsville, Ky., March 19, 1987, reporting preliminary hearing in Edmonson District Court [Exhibit H, Record]. Page 28a.

EXHIBIT 12: Article in Edmonson News, March 12, 1987 [Exhibit I, Record]. Page 31a.

EXHIBIT 13: Article in Park City Daily News daily newspaper, Bowling Green, Ky., March 9, 1987 [Exhibit J, Record]. Page 33a.

EXHIBIT 14: Letter to editor in Park City Daily News, March 19, 1987 [Exhibit K, Record]. Page 35a.

EXHIBIT 15: Editorial in Park City Daily News, March 29, 1987 [Exhibit L, Record]. Page 36a.

EXHIBIT 16: Petitioner's Motion [in Supreme Court of Kentucky] for Certification of Record on Appeal to Clerk of Supreme Court of United States pursuant to Rule 19.1 of Supreme Court of United States. Page 38a.

EXHIBIT 17: Letter from John C. Scott, Clerk, Supreme Court of Kentucky, to Natty Bumppo, attorney for petitioner, acknowledging receipt of Motion for Certification of Record on Appeal (Exhibit 16 hereinabove), reciting treatment of same as a notice and pledging such certification upon request by Clerk of Supreme Court of United States. Page 39a.

EXHIBIT 1

RENDERED: December 17, 1987
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

87-SC-724-MR

DELORES HAYES - - - - - - - *Appellant*

v.

CARMOL D. COOK, Judge, Edmonson Circuit Court;

COMMONWEALTH OF KENTUCKY (Real Party in Interest) - - - - - - - - *Appellees*

MEMORANDUM OPINION OF THE COURT AFFIRMING

The Court of Appeals has denied the appellant a writ of prohibition sought to prevent trial on the present pending indictment. We affirm.

On March 7, 1987, Delores Hayes shot and killed Mark Lindsey at the home of her elderly grandparents, Cecil and Bertha Torrence with whom she was living. Her 13-year-old cousin, Donna Jean Carroll, and her 3-year-old son, Christopher Hayes, were in the home at the time. Appellant admitted in a statement to police detective Roger Castle on the night of the shooting that she fired the weapon that killed Lindsey but stated that she did not intend to hit him.

Mark Lindsey had lived with Delores Hayes in the prior year but was not living with her at the time of his death. They were still dating. Lindsey had gone to the Torrence

home on this particular evening to try and convince Delores to go to the movie with him. When she told him she couldn't go and asked him to leave, he became angry, started swearing at her and threw a log through the front plexiglass window. He then walked to Delores' car and broke out her car window. Upon returning to the front porch, he attempted to climb through the window, and Delores shot him.

Detective Castle charged appellant with murder and her bond was set at $50,000. After a night in jail, appellant was released on bond. On March 16, 1987, a preliminary hearing was held in the Edmonson District Court which resulted in a dismissal of the murder charge. The judge based the dismissal on his belief that she was justified in her actions:

> "The situation as was perceived by the defendant . . . was such that the matter had escalated. It's apparent to this Court that at the time she fired the shot that Mark Lindsey was breaking into the premises; that he had part of his body through the window; that he shot into the premises a projectile, being a piece of glass; and that it came close to her, certainly—or close to someone who she felt responsible to protect, and I think justifiably so. . . . If this does not constitute justifiable self-defense and protection of yourself and others, too, whom you have responsibility, frankly, I don't know what would."

On March 18, 1987, the Edmonson County Grand Jury heard this case to consider what action should be taken against the appellant. After hearing the testimony of nine witnesses, the Grand Jury returned an indictment against appellant of second-degree manslaughter on March 27, 1987. Appellant moved the Circuit Court for dismissal or remand to the Grand Jury, which was denied. She then filed a Petition in the Court of Appeals for a writ prohibit-

ing the circuit court from holding trial on the indictment and/or mandating the trial court to remand the indictment to the Edmonson County Grand Jury. Her Petition was denied.

Appellant asks this Court to vacate the Order of the Court of Appeals, prohibit the circuit court from proceeding on the indictment, and require the indictment to be resubmitted to the Grand Jury for reconsideration.

Appellant's first contention is that the Grand Jury that returned the indictment "was misinformed as to the law of justification as set out in KRS Chapter 503." Appellant argues that in addition to the evidence presented to the Grand Jury, the Commonwealth had a duty to correctly advise the Grand Jury of the law of justification; or a "duty *not* to advise the jury *incorrectly,* or incompletely." Hayes bases this argument on KRS 503.020 and the Commentary thereto which places the burden on the Commonwealth to disprove justification once the defense has been raised by the defendant.

As the Commonwealth observes, an explanation of the defense of justification was made to the Grand Jury even though the defendant did not testify before the Grand Jury as to her version of the events or to raise the defense of justification. Justification as a defense is best suited to a trial in this case before a petit jury. "[W]hether the killing was committed in self-defense is for a jury to determine where there is evidence, with rational inferences, to the effect that it was not so committed." *Taul* v. *Commonwealth,* Ky., 249 S. W. 2d 45, 47 (1952).

Appellant's second argument is that "[t]he indictment was based on misleading, prejudicially selective and prejudicially phrased testimony by the principal investigating peace officer, displaying actual and undue bias against appellant." Hayes is complaining that certain evidence was not presented to the Grand Jury which she believes

should have been presented. Appellant also complains that the investigating officer's bias was apparent not only in his choice of evidence to present and withhold but also in his repetition of certain evidence.

The Commonwealth responds to appellant's contentions by stating that Detective Castle's testimony was factual and based upon the results of his investigation. The investigating officer's duty is to present the findings of his investigation to the appropriate judicial body for it to determine if there is sufficient evidence to support an indictment. The Commonwealth takes the position that presenting testimony does not prove bias or prejudice but does prove the detective was doing his job investigating a criminal act.

The Commonwealth contends that the appellant is actually attacking the indictment because she believes there was not sufficient evidence to indict. When an indictment is otherwise properly returned, neither the defendant nor the court has the power to inquire as to the nature and extent of the evidence. RCr 5.10; *Sebree* v. *Commonwealth*, 260 Ky. 526, 86 S. W. 2d 282, 284 (1935).

Appellant further contends that she has no adequate remedy by appeal as suggested by the Court of Appeals. She claims that even if she is acquitted at trial or convicted with reversal on appeal, she will have been deprived of her liberty without due process of law.

This contention is without merit. There is no dispute that Delores Hayes shot and killed Mark Lindsey. The issue is whether she was justified in her actions. This question is more appropriately raised at trial and should be presented to the jury which will decide the factual issues in this case. The Order of the Court of Appeals is sustained.

All concur.

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EXHIBIT 2

COURT OF APPEALS OF KENTUCKY

No. 87-CA-1297-OA

DELORES HAYES - - - - - - - *Petitioner*

v.

CARMOL D. COOK, JUDGE
EDMONSON CIRCUIT COURT - - - *Respondent*

Original Action
Regarding Edmonson Circuit Court

ORDER—Entered August 3, 1987

BEFORE: WEST, HAYES, and MCDONALD, JUDGES.

Having considered the petitioner's petition for writ of prohibition and the response thereto, and being otherwise sufficiently advised, the Court ORDERS the petition be, and it is hereby, DENIED as the petitioner has an adequate remedy by appeal. *Graham* v. *Mills*, Ky., 694 S. W. 2d 698 (1985). The petitioner's motions to file a reply and for oral argument are hereby DENIED.

(s) Judy M. West
Judge, Court of Appeals

EXHIBIT 3

EDMONSON CIRCUIT COURT

No. 87-CR-001

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

DELORES HAYES - - - - - - - *Defendant*

ORDER

The Court having considered defendant's motion to quash the indictment, and having read the transcript of testimony given before the Grand Jury and the testimony given at the preliminary hearing, and considering the legal memorandum submitted by the attorneys and being sufficiently advised, it is hereby ordered and adjudged the defendant's motion to quash the indictment be, and it is hereby OVERRULED.

Defendant's order for a continuance of the trial is likewise overruled.

This the 12 day of June, 1987.

(s) Carmol D. Cook
Carmol Cook, Judge, Edmonson Circuit Court

EXHIBIT 4

EDMONSON CIRCUIT COURT

Indictment No. 87-CR-001

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

DELORES HAYES - - - - - - - *Defendant.*

INDICTMENT

The Grand Jury Charges:

That on or about the 7th day of March, 1987, in Edmonson County, Kentucky, the above-named defendant committed second-degree manslaughter by wantonly causing the death of Mark Lindsey by shooting him with a pistol, against the peace and dignity of the Commonwealth of Kentucky.

Ronnie C. Dortch
Commonwealth's Attorney

WITNESS: Roger Castle KSP, Dale Decker, Eaethel Lindsey, Willa Dean Whobrey, Deputy Sheriff Jim Fitts, Jim Hunt, Ira Carroll, Jr., Paul Lindsey and Ernest Cockerell.

A TRUE BILL.

(s) Larry R. Carroll
Grand Jury Foreman 3/27/87

Presented by the Foreman of the Grand Jury to the Court in open Court, in the presence of the Grand Jury, and received from the Court by me and filed in open Court, the 27 day of March, 1987.

Bail $10,000.00 Surety Unsecured

(s) Ann Stewart
Clerk

EXHIBIT 5

EDMONSON CIRCUIT COURT

No. 87-CR-001

COMMONWEALTH OF KENTUCKY - - - *Plaintiff,*

v.

DELORES HAYES, - - - - - - - *Defendant.*

NOTICE — MOTION

The undersigned attorney will, at 9 a.m. or as soon thereafter as counsel may be heard on Tuesday, the 2d day of June, 1987, appear before the Court at the Edmonson County Courthouse in Brownsville, Kentucky, to make the motion set out below.

The undersigned attorney certifies that true copies hereof and of any orders tendered herewith were mailed or delivered to Ronnie C. Dortch, Esq., Commonwealth's Attorney, 38th Judicial Circuit of Kentucky, Box 101, Hartford KY 42347, attorney for plaintiff, on May 27, 1987.

MOTION TO QUASH OR DISMISS

Comes now the defendant, by counsel, and moves the Court to quash or dismiss the indictment against defendant initiating this action, and to remand same to the grand jury for reconsideration, on the grounds that:

1. The grand jury that returned said indictment was misinformed as to the law of justification as set out in KRS Chapter 503, and

2. The indictment was based on misleading, prejudicially selective and prejudicially phrased testimony by the principal investigating peace officer, displaying actual bias against the defendant.

In support hereof, defendant states: . . .

* * * * * * *

With the evidence presented to the grand jury, the Commonwealth had a duty to advise the grand jury of the law of justification, and to advise it correctly. The Commonwealth has the burden of proof as to all elements of the crime of which the defendant is accused. KRS 500.070 and official commentary thereto; RCr 9:56; Kentucky Constitution, §11; United States Constitution, 14th Amendment. . . . .

* * * * * * *

The cases from other jurisdictions cited hereinabove speak in terms of constitutional rights, equally applicable to Kentucky. The opinions (copies attached) are well reasoned and are not based on particular or idiosyncratic provisions of the source states' codes or rules or other state law. . . .

EXHIBIT 6

COURT OF APPEALS OF KENTUCKY

No. 87-CA-001297

DELORES HAYES, - - - - - - - *Petitioner,*

v.

CARMOL D. COOK, JUDGE, EDMONSON CIRCUIT COURT, - - - - - - *Respondent.*

PETITION FOR RELIEF PURSUANT TO CR 76.36

Comes now the petitioner, by counsel, and prays for relief, pursuant to CR 76.36 prohibiting respondent from holding trial of action No. 87-CR-001, Commonwealth of Kentucky v. Delores Hayes, in Edmonson Circuit Court, now scheduled for June 22, 1987, and to order respondent to quash or dismiss the indictment initiating said action, or to remand same to the Edmonson County Grand Jury for reconsideration, on grounds that:

1. The grand jury that returned said indictment was misinformed as to the law of justification as set out in KRS Chapter 503;

2. The indictment was based on misleading, prejudicially selective and prejudicially phrased testimony by the principal investigating peace officer, displaying actual bias against petitioner, and

3. Respondent has failed to grant petitioner's motion to quash, dismiss or remand said indictment, and petitioner's substantial rights, including her rights to due process of law and to a fair trial and impartial grand jury hearing,

would be irreparably impaired by her having to stand trial on said indictment. . . .

* * * * * * *

The Hawaii case cites precedent from a number of other jurisdictions, including the United States Supreme Court, and holds that quashal of an indictment is an appropriate remedy "where a defendant's substantial constitutional right to a fair and impartial grand jury proceeding is prejudiced." *State* v. *Joao, supra,* at 491 P. 2d 1092. . . .

Due process of law is not merely a defendant's right to a fair trial, but includes her right not to be unjustly accused, as the *Daneals* case held. . . .

EXHIBIT 7

SUPREME COURT OF KENTUCKY

No. 87-SC-724-MR

DELORES HAYES, - - - - - - - *Appellant,*

v.

CARMOL D. COOK, JUDGE, EDMONSON CIRCUIT COURT, - - - - - - - *Appellee.*

BRIEF FOR APPELLANT

STATEMENT OF POINTS AND AUTHORITIES

I. The grand jury that returned the indictment against appellant was misinformed as to the law of justification as set out in KRS Chapter 503, and her indictment deprived her of her liberty without due process of law in violation of Sections 1, 2, 10, 11 and 26 of the Kentucky Constitution and the 14th Amendment to the United States Constitution. KRS 500.070, 503.020, 503.040; RCr 9.56; *Davis* v. *Commonwealth,* Ky., 252 S.W. 2d (1952); *People* v. *Kinnicut,* 371 N.Y.S. 2d 984, 83 Misc. 2d 229 (1975); *United States* v. *Daneals,* 370 F. Sup. 1289 (1974). Page 8.

II. The indictment was based on misleading, prejudicially selective and prejudicially phrased testimony by the principal investigating peace officer, displaying actual and undue bias against appellant and thereby depriving her of her liberty without due process of law in violation of Sections 1, 2, 10, 11 and 26 of the Kentucky Constitution and the 14th Amendment to the United States Constitution. *State* v. *Joao,* 53 Ha. 226, 491 P. 2d 1089 (1971); *United States* v. *Daneals, supra.* Page 10.

III. Appellee's failure to grant appellant's motion to quash, dismiss or remand said indictment, without prohibition, would irreparably impair appellant's rights to a fair and impartial grand jury hearing and not to be deprived of her liberty without due process of law in violation of Sections 1, 2, 10, 11 and 26 of the Kentucky Constitution and the 14th Amendment to the United States Constitution. Kentucky Constitution, Section 1, 2, 10 and 11; United States Constitution, 4th and 14th Amendments; Black's Law Dictionary; 42 CJS 1190; Fitzgerald, 8 Kentucky Practice 199; *Ashland* v. *Heck's Inc.*, Ky., 407 S. W. 2d 421 (1966); *Buchanan* v. *Sowa*, 592 F. Sup. 1009 (1984); *Graham* v. *Mills*, Ky., 649 S. W. 2d 698 (1985); *Monroe* v. *Pape*, 365 U. S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961); *People* v. *Kinnicut, supra; Russell* v. *Commonwealth*, Ky., 405 S. W. 2d 683 (1972); *State* v. *Joao, supra; United States* v. *Daneals, supra; Vaughn* v. *Commonwealth*, Ky., 485 S. W. 2d 497 (1972). Page 15. . . .

EXHIBIT 8

EDMONSON CIRCUIT COURT

No. 87-CR-001

COMMONWEALTH OF KENTUCKY, - - - *Plaintiff,*

v.

DELORES HAYES, - - - - - - - *Defendant.*

NOTICE — MOTION

The undersigned attorney will, at 10 a.m. or as soon thereafter as counsel may be heard on Tuesday, the 7th day of April, 1987, appear before the Court at the Edmonson County Courthouse in Brownsville, Kentucky, to make the motion set out hereinbelow.

The undersigned attorney certifies that true copies hereof and of any orders tendered herewith were mailed or delivered to Ronnie C. Dortch, Esq., Commonwealth's Attorney, 38th Judicial Circuit of Kentucky, Box 101, Hartford, KY 42347, attorney for plaintiff, on March 30, 1987. bccl

MOTION FOR RECUSAL

Comes now the defendant, by counsel, and states:

1. That the Hon. Carmol D. Cook, Judge of this Court, presided over criminal action No. 86-CR-004, Commonwealth of Kentucky v. Mark Lindsey, in this Court, in which the defendant was the same Mark Lindsey alleged to have been a victim of a homicide in the indictment initiating the present action, and in which the victim and

complaining witness was the same Delores Hayes now defendant in the present indictment.

2. That the last entry in said prior action was an Order for Deferred Prosecution, dated and entered July 1, 1986, by which prosecution of the said Mark Lindsey was deferred by this Court for two years, after which the indictment was to be dismissed, without prosecution, on condition the said Mark Lindsey not be charged with any criminal offense during the said two years and subsequently convicted thereof.

3. That there is no record in said prior action of notice to or consultation with the said Delores Hayes regarding said deferred prosecution order or the application therefor, or of her consent thereto.

4. That at the time of entry of said order, there were pending against the said Mark Lindsey:

A. In action No. 86-M-025 in Edmonson District Court, a 30-day suspended jail sentence for conviction of assault in the fourth degree on the said Delores Hayes.

B. In action No. 86-F-068 in Grayson District Court, a 90-day suspended jail sentence for conviction of custodial interference for abducting the said Delores Hayes' 2-year-old son, Christopher Hayes, from a commercial establishment in Grayson County and driving him to Edmonson County.

C. In action No. 86-M-056 in Edmonson District Court, charges not yet brought to trial of operating a motor vehicle on a suspended or revoked license, attempting to elude a police officer and resisting arrest resulting from the aforesaid incident in which the said Mark Lindsey had abducted the said 2-year-old Christopher Hayes in Grayson County and driven him to Edmonson County.

D. In action No. 86-F-006 in Edmonson District Court, charges not yet brought to trial of terroristic threatening of the said Delores Hayes, her grandfather Cecil Torrence and others (two counts).

E. In action No. 86-F-013 in Edmonson District Court, three concurrent 348-day suspended jail sentences for convictions of criminal trespass in the first degree at the said Delores Hayes' residence, terroristic threatening of the said Delores Hayes and assault in the fourth degree on the said Delores Hayes.

F. In action No. 86-F-014 in Edmonson District Court, a 348-day suspended jail sentence, concurrent with those in action No. 86-F-013 in said Court, for conviction of terroristic threatening of the said Delores Hayes.

G. In action No. 86-F-089 in Grayson District Court, a felony charge on which a warrant was yet outstanding for the arrest of the said Mark Lindsey for criminal abuse in the second degree for beating the said Christopher Hayes, 2-year-old son of the said Delores Hayes, with a belt buckle.

5. That subsequent to the entry of said Order for Deferred Prosecution, the said Mark Lindsey,

A. In action No. 85-T-137 in Edmonson District Court, failed to pay his fine and court costs previously imposed, in violation of KRS 534.060, but never was arrested on a warrant issued September 20, 1986, for said failure,

B. In action No. 86-F-013 in Edmonson District Court, failed to pay his court costs previously imposed, in violation of KRS 534.060, and, although arrested for said violation October 24, 1986, was never prosecuted therefor,

C. In action No. 86-F-014 in Edmonson District Court, failed to pay his court costs previously imposed, in violation of KRS 534.060, but never was arrested on a warrant issued October 3, 1986, for said failure,

D. In action No. 86-F-089 in Grayson District Court, was charged with and convicted of violation of terms of probation granted on a conviction for criminal abuse of the said Christopher Hayes in the third degree, and later was charged again with a subsequent violation of terms of probation granted again in said action and never arrested on the warrant issued in said charge,

E. In action No. 86-M-208 in Edmonson District Court, charged with operation of a motor vehicle on a suspended or revoked license and reckless driving with the said Delores Hayes and Christopher Hayes in his vehicle and never brought to trial on said charges, and

F. In action No. 87-F___ in Edmonson District Court, charged with escape in the first degree and never arrested on the warrant issued on said charge.

6. That no order ever was entered by this Court requiring the said Mark Lindsey to show cause why he should not be prosecuted in the aforesaid prior action in this Court because of violation of the terms of the said Order for Deferred Prosecution.

7. That it appears to the defendant in the present action, from the facts recited hereinabove, that the Hon. Carmol D. Cook, Judge of this Court, has a bias or prejudice against her and in favor of the said Mark Lindsey.

8. That, by reason of this Court's attention having been directed to this motion and the matters of public record cited herein, the Hon. Carmol D. Cook, Judge of

this Court, has knowledge of circumstances in which his impartiality might reasonably be questioned in the present action, within the meaning of KRS 26A.015(2)(e).

WHEREFORE defendant moves the Hon. Carmol D. Cook, Judge of this Court, pursuant to KRS 26A.015(2)(e), to disqualify himself from further proceedings in this action.

(s) Natty Bumppo
Natty Bumppo
Attorney for Defendant
Box 413
Brownsville, KY 42210
(502) 597-2187

EXHIBIT 9

EXCERPT OF PETITIONER'S ATTORNEY'S ARGUMENT TO EDMONSON DISTRICT COURT AT PRELIMINARY HEARING MARCH 16, 1987 (EXHIBIT N, RECORD, PAGES 108-112).

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. . . He said she invited Mark Lindsey to her house. I believe the testimony was in all the statements, that he says, "Can I go?" And she said — "Can you go to the movies?" And she says, "I'll see." That's when she is on the road with her cousin and trying to get away from this guy, who's been harassing her and beating her, and beating

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her son, and kidnapping her son, for a year. And she is trying to get away one more time, and he says, "Let's go to the movies." And she says, "I'll see." The worded officer interprets this as an invitation to the house. "Come on up and get it, Mark."

The ignorance of this Detective, Your Honor, is just appalling. Just appalling. He states that you cannot upgrade a charge once it is filed. What State Police school did he go to? That's why he had to charge her with murder.

He says you arrest people for their own protection. Is this America? Where did he get that?

This is just appalling. He knows nothing of the statutes that entitle a person to use force, and deadly force if necessary, to protect himself and to protect others and to protect their property. He knows not what their rights are. Their rights are a paragraph printed on paper. "Well, don't worry about it." What is the big deal? So what? So what if you find there's no probable cause? So

what, the Grand Jury is going to go investigate this case when?

And it should investigate this case when.

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A Grand Jury should investigate every homicide that happens in this county. I don't care if 7,999 people out of a population of 8,000 thinks it was self-defense, and justification and protection of others, and protection of property, and the only person who thinks it might have been murder was the defendant, himself, the Grand Jury still should investigate that homicide. What's a Grand Jury for? That's what it's for. The Grand Jury should investigate the death of Mark Lindsey. That's its responsibility. It should look into every homicide in this county that ever happened, and it does, customarily.

And the reason that the Grand Jury does, is that it can do that without the public glare that attends a proceeding like this one, or attends an arrest like the one we had a week ago, and they can sift through the evidence and decide if there's probable cause in circumstances such as this one, where we have a lady with no criminal record, has R.O.R. evaluation, (inaudible) Your Honor; a lady who has lived in this county and Grayson County her

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entire life, 29 years; a lady who has held the same job in Leitchfield, Kentucky for the last six years; a lady who owns property that she resides on in Bee Springs, Edmonson County Kentucky; a lady who has a three year old son and is dependent on child support for part of her livelihood; she's not going anywhere.

And there's no earthly reason to believe that she might shoot anybody, other than the person she shot March the 7th, and now perhaps herself, because this appallingly ignorant detective has charged her with murder because

he thinks he has to, because he does not know any other way to handle the case. And now she's branded as a murderess throughout the state of Kentucky by her name having been printed as a murderess in the state's newspaper's largest circulation, has been beamed to 250,000 homes through the t.v. station in Bowling Green as a murderess. That is the significance of this case. I'm not going to suggest she should get a medal, but there's no probable cause, nothing in the evidence at all in this case to indicate that a felony has been committed.

EXHIBIT 10

RULING BY EDMONSON DISTRICT COURT, THE HON. ROBERT E. HAWLEY, JUDGE, AT PRELIMINARY HEARING MARCH 16, 1987 (EXHIBIT N, RECORD, PAGES 118-121).

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THE COURT: The Court has heard all the evidence in this case and has heard argument from counsel, and very frankly the Court was decided in the matter with regard to the necessary finding, or lack of finding, of probable cause before the arguments were given here in open Court. I say that, because to some extent, I do disapprove of some of the rancor that Mr. Bumppo got involved in in some of the verbal abuse. Certainly, I feel that he was emotionally concerned with the case and justifiably so, but I don't think there's any call for that in the courtroom and I want the report to reflect that I disapprove of that. I think obviously an attorney has to have a lot of leeway in expressing his own thoughts and in representing his client, but that I think that the very personal harangue against an officer who was attempting to the best of his ability to do his job was uncalled for.

That brings us down to the actual issues that the Court has

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before it. As far as I'm concerned the Court cannot, in a capital case of this kind, make a probable cause finding in a vacuum. If all that I had to do this afternoon was to make a probable cause finding as to whether or not Mark Lindsey was shot and whether or not as a result of that shooting he died, and whether in fact it was Delores Jean Hayes that pulled the trigger and caused him to be killed,

then the job would be easy and probable cause could be found with no problem.

But again, it cannot be done in a vacuum. I think Mr. Bumppo was correct in his argument that you have to consider not only the homicide statutes, itself, but you have to consider those exculpatory statutes in KRS 503.050, and 503.070. The situation as was perceived by the defendant, and that's how you have to look at self-defense in any aspect, was such that the matter had escalated. It's apparent to this Court that at the time she fired the shot that Mark Lindsey was breaking into the premises; that he had part of his body through the window; that he shot into the

premises a projectile, being a piece of glass; and that it came close to her, certainly—or close to someone who she felt responsible to protect, and I think justifiably so. This is all according to spontaneous testimony that was given to the Kentucky State Police, that they readily admitted here today, and that the reduced to the form of a Statement shortly after the incidents occurred. If this does not constitute justifiable self-defense and protection of yourself and others, too, whom you have responsibility, frankly, I don't know what would.

After having made those findings, I failed to find that all the elements necessary of probable cause exist, and the charge is dismissed. It's the Order of the Court, that as Mr. Bumppo reflected, that even though this matter has been dismissed here at the District Court level, that it should, as all homicides should, be investigated by the Grand Jury, and I would encourage the Commonwealth to reinvestigate the matter before the Grand Jury. But certainly between now and that time, this Court sees no

justification in holding the defendant under the present charges, and as I indicated, at the present point, they are dismissed.

EXHIBIT 11

EXCERPT FROM EDMONSON NEWS, MARCH 19, 1987, BROWNSVILLE, KY.

MURDER CHARGE IS DISMISSED

District Court Judge Robert Hawley Monday dismissed a murder charge against Delores Hayes, 29, of Bee Spring. She had been charged with the shooting death of Mark Dwayne Lindsey, 20, of Brownsville on March 7.

In doing so, he chastized her attorney, Natty Bumppo, for the "verbal abuse" he directed toward State Police Det. Roger Castle, who was in charge of the investigation. Judge Hawley said there was "no call for that in a courtroom."

However, the judge said the incident "should be investigated by the grand jury. But until then, I see no justification in holding the defendant under the present charge."

Castle said later he planned to present the case to the grand jury. Jurors were to consider it yesterday (Wednesday).

Judge Hawley summed up the escalation of events of that night. From Ms. Hayes point of view, he said, there was Mark Lindsey trying to break into the house. He shot a piece of glass "close to someone (her grandmother) she felt she had to protect."

"If this isn't justified self-defense, I don't know what is," he said.

Castle and other law enforcement officers testified that she told them she hadn't meant to hit Lindsey, just fired in his direction.

The events of the night, as recounted at the preliminary hearing, started as Ms. Hayes, Donna Jean (D.J.) Carroll, 13, and Junior Carroll were returning to Bee Spring from Leitchfield.

They stopped at a store enroute and saw Lindsey there. Ms. Hayes had lived with him for some months previously and dated him for a year.

However, it had been a stormy relationship, with Ms. Hayes a number of times calling police. At least once she threatened him with a gun, but was able to talk to him and calm him down.

On the night of March 7, he wanted her and D.J. to go to the movies with him. She put him off and they started home. Along the way, he jumped out in front of the car and again tried to talk her into going to the movies. She said she would have to go home and see about it.

He followed them home and she called the sheriff to say he was bothering her.

Ms. Hayes told Lindsey to leave and he went away for a few minutes, then came back and broke a front window. Her grandfather, Cecil Torrence, with whom she lived, called out that he had something in his hand.

Lindsey threw a log and then a piece of glass into the room and had his head through the window as though he was coming into the room.

"I shot at Mark," Ms. Hayes told police.

He said: "I've been shot" and she said, "No, you haven't."

At that he fell on the porch in a pool of blood.

Bumppo told the court Lindsey had been arrested eight times during the past year for harrassing Ms. Hayes, that he had beaten her, kidnapped her little boy and beaten the child.

The night of the shooting, he said, she was trying to get away from Lindsey. In shooting him, she was trying to protect her home and her family, he said, noting that was "clearly a case of self-defense."

Police had stated they arrested her for her own protection, Bumppo said. Adding: "Now she is branded as a murderess throughout the state of Kentucky."

He insisted: There is no earthly reason to believe she might shoot anybody but Mark Lindsey.

EXHIBIT 12

EXCERPT FROM EDMONSON NEWS, MARCH 12, 1987

BEE SPRING WOMAN IS CHARGED IN SHOOTING

Delores Hayes, 29, of Bee Spring was charged with murder after a shooting Saturday night at her home.

Dead was Mark Dwayne Lindsey, 20, of Brownsville.

According to State Det. Roger Castle, Ms. Hayes was released on her own recognizance. She is to be in District Court here at 1 p.m. tomorrow (Friday).

Castle said the shooting occurred at about 9 p.m. Saturday. Lindsey went to Ms. Hayes home to ask her to go to the movies, Castle said.

She refused. He broke a window and was leaning through it when she shot him once through the heart with a 38 pistol from a distance of 10 feet, Castle said.

She told Castle she didn't mean to hit Lindsey.

'The gun belonged to her former husband and she said she never did shoot straight,' Castle said.

He said he believed the murder charge would be amended to a lesser charge.

Lindsey was pronounced dead at the scene by Edmonson County Coroner Ed Minyard.

Sheriff Jerry Prunty said there had been trouble before between the pair. A week earlier, on Saturday night, they received four calls from Ms. Hayes that he was bothering her, Prunty said.

Each time they arrived, Lindsey would run away, he said.

Ms. Hayes had called for help about an hour and one half before the shooting. Prunty said, when Lindsey stopped her car.

Sheriff's Deputy Billy Fitts, answering a second call, pulled up in the driveway just as she shot Lindsey, Prunty said.

Ms. Hayes' attorney, Natty Bumppo, said the action was 'a clear case of self-defense, and I do not understand why Ms. Hayes was arrested.'

EXHIBIT 13

EXCERPT FROM PARK CITY DAILY NEWS, MARCH 9, 1987, BOWLING GREEN, KY.

WOMAN CHARGED IN KILLING

Brownsville, Ky.—An Edmonson County woman has been charged with murder in the shooting death of a man with whom she once lived who was apparently trying to break into her home.

According to state police and Edmonson County authorities, Delores Hayes, 29, of Bee Spring was arrested Saturday night after she shot and killed Mark Dwayne Lindsey, 20, of Edmonson County.

Edmonson County Sheriff's Deputy Jim Fitts said he arrived at the scene within minutes of the shooting and found Lindsey dead on the porch of the home that Ms. Hayes shares with her 3-year-old son and grandparents.

He said Lindsey had apparently broken out a window and was attempting to enter the house when Ms. Hayes shot him once with a .38-caliber handgun.

Edmonson County Coroner Ed Minyard declared Lindsey dead at the scene from a neck wound.

An autopsy was performed Sunday at Hardin Memorial Hospital in Elizabethtown. The results of that autopsy, including Lindsey's blood-alcohol level, were not available.

Edmonson County Sheriff Jerry Prunty said Fitts had been dispatched to the house before the shooting in response to a telephone call for help and that Ms. Hayes had called for protection from Lindsey several times over the past several months.

"It was a clear case of self-defense, and I do not understand why Ms. Hayes was arrested," said Ms. Hayes' attorney, Natty Bumppo of Brownsville.

After spending Saturday night in jail, Ms. Hayes posted a $10,000 unsecured bond and was allowed to go home about 1 p.m. Sunday, according to Bumppo.

State police Detective Roger Castle, the officer who apparently arrested Ms. Hayes, could not be reached for comment.

Bumppo said he expects the murder charge against Ms. Hayes to be dropped but also predicted the county grand jury scheduled to convene March 17 would hear evidence.

EXHIBIT 14

EXCERPT FROM PARK CITY DAILY NEWS, MARCH 19, 1987, BOWLING GREEN, KY.

LETTERS TO DAILY NEWS EDITOR

Woman Shouldn't Have Been Charged

Editor, Daily News:

Blind faith in the ability of law enforcement officials and the courts to defend citizens against violent crime is ill founded and the public should be told that each individual is ultimely responsible for his own protection and that of those who depend on him for such.

This fact was proven last week when a woman, who had asked for protection, was forced to kill an intruder in self-defence when her home was broken into. She was then charged with murder and placed in jail. This added humiliation to what was already a traumatic situation for her. The arresting officer said there was not enough evidence to support the charge and that the arrest was made for her protection.

He might have charged her with treason on the high seas or perhaps desertion in the face of the enemy. These charges can not be substantiated either but if you are going to pull a charge out of the air, one is as good as another.

When it is obvious that a person has acted to protect himself as the Constitution and common sense gives him the right to do, he should not be treated as a criminal.

Ed Ramsey
1040 Shive Lane
Bowling Green

EXHIBIT 15

EXCERPT FROM PARK CITY DAILY NEWS, MARCH 29, 1987, BOWLING GREEN, KY.

Editorial

KSP HANDLED CHARGES POORLY

The Kentucky State Police's handling of a case involving the slaying of an Edmonson County man has been questionable from the start.

Delores Hayes of Bee Spring told state police she shot and killed Mark Dwayne Lindsey in self-defense when he tried to break into her home on March 7.

State police Detective Roger Castle said he didn't doubt Ms. Hayes' account of the shooting, but he arrested her on a charge of murder anyway. He said he did so "to get her out of the area" and protect her from retaliation by Lindsey's relatives.

Castle said he expected the charge to be changed or reduced by an Edmonson County grand jury when it convened March 17.

It didn't even take that long.

Edmonson District Judge Robert Hawley dismissed the murder charge March 16, leaving it up to the grand jury to decide whether any charges should be placed at all.

That's how the case probably should have been handled in the first place.

It was wrong to charge Ms. Hayes with murder when the evidence apparently wasn't there to back it up.

All it did was force Ms. Hayes to spend a night in jail and to go to court to get the charge dropped.

The problem was then compounded when a news release was mistakenly issued by the post early last week saying

Ms. Hayes had been indicted on a charge of second degree manslaughter.

The grand jury, however, did not return an indictment until Friday, when it charged here with, indeed, second-degree manslaughter.

We hate to criticize the state police for releasing information since we often seek more information than they are willing to give.

But is certainly does no good for the state police to release information, or for the news media to report it, if it may be wrong.

And since the prosecution now says there is new evidence that Ms. Hayes may not have acted totally out of self-defense, it seems even more premature for the police to have charged her initially with murder only to have the charge dropped.

The mistakes of the state police in the Bee Spring case do appear to have resulted from good intentions — protecting Ms. Hayes and keeping the public informed.

For that reason, the state police shouldn't be judged too harshly.

But we certainly hope that those involved learn from their mistakes and demonstrate greater care in handling the next such investigation.

EXHIBIT 16

SUPREME COURT OF KENTUCKY

No. 87-SC-724-MR

DELORES HAYES, - - - - - - - *Appellant,*

v.

CARMOL D. COOK, JUDGE,
EDMONSON CIRCUIT COURT, - - - - - *Appellee.*

MOTION FOR CERTIFICATION OF RECORD ON APPEAL

Comes now the appellant, by counsel; declares her intention to petition the United States Supreme Court for a writ of certiorari for review of the memorandum opinion and final order of this Court rendered in this appeal December 17, 1987, and, pursuant to Rule 19.1 of the United States Supreme Court, moves this Court to certify the record of this appeal to the Clerk of the United States Supreme Court and to provide for its transmission to the Clerk of the United States Supreme Court. . . . December 21, 1987.

Natty Bumppo
Attorney for Appellant
Box 413
Brownsville, KY 42210
(502) 597-2187

EXHIBIT 17

[Seal]

Office of Clerk

SUPREME COURT OF KENTUCKY
State Capitol, Frankfort 40601

John C. Scott
Clerk

Room 209
(502) 564-4720

December 22, 1987

Natty Bumppo
Box 413
Brownsville, KY 42210

Re: Delores Hayes vs. Carmol D. Cook, Judge, Edmonson Circuit Court—File No. 87-SC-724-MR

Dear Mr. Bumppo:

We have received your motion (treated as a notice) for certification of the record and transmission to the Clerk of the United States Supreme Court. The record in his case will be sent to the U. S. Supreme Court upon request by the Clerk of that court.

Sincerely,
JOHN C. SCOTT, CLERK

(s) By: Betty Whitton
Betty Whitton
Chief Deputy Clerk

cc: Carmol D. Cook, Judge
David L. Armstrong, Attorney General
Ronnie C. Dortch, Commonwealth Attorney